

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

VINCENT LOVE,
Plaintiff and Appellant,

v.

THE REGENTS OF THE UNIVERSITY
OF CALIFORNIA,

Defendant and Respondent.

2d Civil No. B230418
(Super. Ct. No. 1339741)
(Santa Barbara County)

Vincent Love appeals the grant of summary judgment to respondent, The Regents of the University of California, and the dismissal of his complaint against respondent for discrimination, breach of contract, retaliation and defamation. Appellant contends that the trial court committed prejudicial error by granting summary judgment and dismissing his case without determining that respondent's evidence was not substantial, or determining who was telling the truth. We affirm.

BACKGROUND

Employment History

Appellant worked at the University of California Santa Barbara in the respondent's custodial department from 1989 until 2002, when he transferred to the facilities management department (grounds). He worked in grounds through July 3,

2007. Respondent often cited appellant for misconduct or poor performance when he was a custodian. It suspended him in 1994, after investigating a sexual harassment charge by female coworkers. In 1996, respondent suspended appellant for belligerent, physically aggressive conduct. Respondent rated appellant's 2001 and 2002 performance unsatisfactory in written reviews that cited multiple deficiencies, including failure to follow procedures and excessive absences.

Respondent transferred appellant to the grounds department in 2002, provided him with months of cross-training, and reclassified him as a groundskeeper in 2003. Appellant's performance reviews from 2003 through 2005 include comments about his poor communication skills. In early 2003, respondent warned him that he could not remain in grounds if he could not develop the ability to work with a variety of people and accommodate "changing work directives." Respondent allocated time and personnel to appellant's improvement. Appellant failed to improve significantly, and respondent continued to encourage and support his improvement, using a variety of means including counseling and discipline.

In 2006, respondent's grounds management often advised appellant that he must improve his performance and that continued misconduct could result in his termination. It not only disciplined him but also proposed a plan with reciprocal actions for respondent and appellant to take to facilitate his improvement. It modified that plan after meeting with appellant and his representative.

On December 15, and 22, 2006, respondent advised appellant that it was providing him the opportunity to attend professional counseling at respondent's expense, off-site, while receiving compensation. In January 2007, appellant made loud, intimidating, belligerent threats to his supervisor, insisting that respondent provide on-site counseling for him. Respondent suspended appellant with a warning that such conduct was not acceptable and could result in further discipline, up to and including termination. After similar events transpired, respondent notified appellant on June 21, 2007, that his employment would be terminated effective July 3, 2007. It terminated him on that date.

Department of Fair Employment and Housing (DFEH) Complaints

On May 5, 2006, appellant filed a complaint with the DFEH alleging that respondent denied him training opportunities because of his race. Although its internal investigation indicated otherwise, on July 14, 2006, respondent sent appellant a letter offering him additional training opportunities. He declined that training because it was off-site.

On March 19, 2007, the DFEH sent appellant a letter stating that its investigation had "failed to link racial animus to the matters [appellant] complained of." The DFEH expressly found that documentary evidence showed that appellant had "serious job performance issues for several years."

On April 3, 2007, the DFEH issued a combined notice of case closure and right-to-sue letter. It advised appellant that a civil action based upon his complaint must be filed within one year from April 3, 2007. Appellant did not file an action based on that complaint within the one-year limitations period specified in the right-to-sue letter.

On December 12, 2007, appellant filed a complaint with the DFEH alleging that respondent terminated him in retaliation for having filed his 2006 DFEH complaint. On February 13, 2008, after investigating his 2007 retaliation complaint, the DFEH notified appellant that it was closing its investigation and issuing a right-to-sue notice.

Trial Court Proceedings

On October 24, 2008, appellant filed a complaint in the Santa Clara County Superior Court naming respondent as defendant in a wrongful termination action. That court granted respondent's motion to change venue and transferred the action to the trial court (Santa Barbara County Superior Court). Appellant has appeared in pro per at all stages of this action.

On December 10, 2009, appellant filed his third amended complaint alleging causes of action for breach of contract (based on wrongful termination and discriminatory failure to train), retaliation and defamation. Respondent deposed appellant on June 8, 2010.

On August 23, 2010, respondent filed a motion for summary judgment, or in the alternative, for summary adjudication of appellant's claims. Respondent submitted evidence in support of its motion, including copies of appellant's poor performance reviews, and records of the progressive discipline and opportunities for improvement it had provided appellant for many years. It also submitted excerpts of deposition testimony in which appellant admitted that he could not identify any facts to show that his termination was motivated by retaliation. In addition, respondent submitted documentation to show that appellant's failure-to-train and defamation claims were barred by the applicable statutes of limitations.

On October 21, 2010, appellant submitted a two-page, hand-printed opposition to respondent's motion for summary judgment stating that all of his "evaluations but one [had] been satisfactory," and that he had witnesses, documents and photographic evidence. He did not submit a separate statement as required by Code of Civil Procedure section 437c, subdivision (b)(3),¹ or deposition testimony, declarations, documents, or any evidence whatsoever, to support his opposition.

On November 8, 2010, the trial court heard the summary judgment motion in the presence of both parties. On that date it ruled that appellant's claims presented no triable issues of material fact, and granted respondent's motion. On December 23, 2010, it entered summary judgment in respondent's favor and dismissed appellant's action with prejudice.

DISCUSSION

Appellant contends that the trial court erred in granting summary judgment and dismissing his action because there were, in fact, triable issues of fact. We disagree.

Summary judgment is warranted when all of the papers submitted show there is no triable issue of any material fact and the moving party is entitled to a judgment as a matter of law. (§ 437c, subd. (c).) A defendant may move for summary judgment if it contends that the action lacks merit. (*Id.* at subd. (a).) A defendant meets its initial

¹ All statutory references are to the Code of Civil Procedure unless otherwise stated.

burden of showing a cause of action is without merit if it has shown that one or more elements of the cause of action cannot be established, or that there is a complete defense thereto. (*Id.* at subd. (p)(2).) Once the defendant makes such a showing, the burden shifts to the plaintiff to produce evidence demonstrating the existence of a triable issue of material fact. (*Ibid.*; *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.)

"When reviewing a trial court's decision granting summary judgment to a defendant, we, '[l]ike the trial court, . . . view the evidence in the light most favorable to the opposing party [i.e., the plaintiff] and accept all inferences reasonably drawn therefrom. [Citation.]' [Citation.] We use the same three-step analysis as the trial court: (1) identifying the issues framed by the pleadings; (2) determining whether the defendant negated the plaintiff's claims; and (3) deciding whether the plaintiff demonstrated the existence of a triable, material factual issue. [Citation.]" (*Suarez v. Pacific Northstar Mechanical, Inc.* (2009) 180 Cal.App.4th 430, 436-437.) In reviewing the trial court's ruling, this court takes the facts from the record that was before the trial court when it ruled on the motion for summary judgment. (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1249-1250.)

In opposing the summary judgment motion, appellant asserted that he could provide witnesses and other evidence at trial to dispute respondent's evidence. He did not, however, present any evidence in the trial court before it ruled on that motion, dismissed the within action, and entered judgment in respondent's favor. Appellant states in his opening brief that when he filed his opposition to the motion, he was not able to include his "'evidence binder' at the same time because [he] was still working on it," and when he "finally got it together the superior court could not take [his] 'evidence binder' because the case was already dismissed on summary judgment[]." Nothing in the record or the briefs suggests that appellant asked the trial court for a continuance to submit further evidence before it ruled on the motion.

In his opening brief, appellant asserts that each time he "went to a court hearing, [he] always had [his] document of evidence of fact with [him] in case the judge ask[ed him] if [he had] proof of evidence to show, to determine the facts, [but] the judge

never ask[ed]." However, a court considering a summary judgment motion is not required to "uncover and evaluate the significance of unidentified documents" or become "an advocate for parties resisting summary disposition of their claims." (*Artiglio v. General Electric Co.* (1998) 61 Cal.App.4th 830, 842.)

An employer who moves for summary judgment in an employment discrimination case has the initial burden of establishing either that one or more elements of the plaintiff's prima facie case is lacking, or that the adverse employment action was based upon legitimate, nondiscriminatory reasons. (*Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 203; *Hicks v. KNTV Television, Inc.* (2008) 160 Cal.App.4th 994, 1003.) Respondent met that burden. Appellant then had the burden of producing "substantial evidence" that respondent's stated reason for the adverse action was a pretext for intentional discrimination, rather than the actual basis for the action (termination or failure to train). (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1004-1005.) Appellant failed to meet that burden.

The evidence before the trial court established that there was no triable issue of material fact as to any of appellant's claims. For example, the evidence demonstrated that he was terminated for cause, and not for any discriminatory reason, following years of written warnings, suspensions, and other forms of progressive discipline. Under the circumstances, respondent was entitled to summary judgment on appellant's wrongful termination and discrimination actions. (§ 437c, subd. (c); *Hicks v. KNTV Television, Inc.*, *supra*, 160 Cal.App.4th at p. 1003.)

Respondent also demonstrated that there was no triable issue of fact concerning appellant's failure-to-train claim.² It submitted evidence showing that after the DFEH investigated appellant's 2006 denial-of-training discrimination claim, it found that it lacked merit, and that appellant had had "serious job performance issues for several

² Although appellant pleaded the termination of employment and failure to train as one breach of contract cause of action, each claim constitutes an independent basis for relief. We therefore consider them separately. (*Lilienthal & Fowler v. Superior Court* (1993) 12 Cal.App.4th 1848, 1854.)

years." Respondent further showed that appellant declined to participate in certain training that it offered him.

The evidence before the trial court further established that appellant's denial-of-training discrimination claim is barred by the applicable statute of limitations. Government Code section 12965, subdivision (e)(2) requires that a suit for discrimination be brought within "one year from the date of the right-to-sue notice by the [DFEH]." The DFEH sent appellant a right-to-sue letter informing him that any civil action based on the claims in his complaint was required to be filed within one year of April 3, 2007. Appellant first filed the within action more than a year after that date, on October 24, 2008.

Further, the evidence established that appellant's defamation claim is barred by the statute of limitations. Section 340, subdivision (c) provides that an action for defamation must be brought within one year of the date that the defamatory statement is published. (See *Shively v. Bozanich* (2003) 31 Cal.4th 1230, 1246.) Appellant does not allege that respondent or its employees made any defamatory statements after his July 3, 2007, termination. He first filed the within action more than a year later, on October 24, 2008.

DISPOSITION

The judgment is affirmed. The parties shall bear their own costs on appeal.
NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Colleen K. Sterne, Judge
Superior Court County of Santa Barbara

Vincent Love, in pro. per., for Appellant.

Price, Postel & Parma, Timothy E. Metzinger, for Respondent.